Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB

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I. INTRODUCTION

Much ink has been spilled recently over the policies and decisions of the National Labor Relations Board under the Reagan Administration.[1] Union officials have charged that the current Board consists of anti-labor radicals who appear determined to restructure labor-management relations and undermine employee rights by drastically revising established tenets of labor law. Pro-union critics of the Board have pointed to decisions such as *Clear Pine Mouldings, Inc.*,[2] where the Board abandoned the "sticks and stones" theory as a measure of picket line conduct and upheld an employer's refusal to reinstate a worker who verbally threatened non-striking employees; or *Meyers Industries, Inc.*,[3] in which the Board held that a single employee who reported safety problems to a state agency was not engaged in protected concerted activity and could therefore be discharged; or *Rossmore House*,[4] where the Board reversed prior decisions holding that management questioning of employees regarding union organizing efforts is inherently coercive and thus illegal; or the highly controversial opinion in *Milwaukee Spring II*,[5] in which the Board ruled that, absent a contractual prohibition, an employer's unilateral decision to relocate from a unionized to a nonunion facility during the term of a collective bargaining agreement was not an unfair labor practice. Some management representatives, in praise of developments at the NLRB, have argued that the current Board is simply rejecting many of the "activist experiments" undertaken by the NLRB in the 1970s and returning labor relations to "traditional and time-tested" principles.[6]

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1. *See, e.g.*, Starr, *Policy Reversals at the Labor Board—What Do They Mean?*, 1 LABOR AND EMPLOYMENT LAW NEWSLETTER No. 4, at 16 (1984); *The Reagan Board Or How To Undo 50 Years Of Labor Law In Three Easy Appointments*, DAILY LAB. REP. (BNA) No. 189, at E-1 (Sept. 28, 1984) (United Food and Chemical Workers Legal Department); *NLRB's New Majority Uproots Principles Set Under Carter, Angering Many Unions*, Wall St. J., Jan. 25, 1984, at 35, col. 3; *Reagan Board Appointees Reverse Previous Board Rulings*, 5 INDUSTRIAL UNION DEP'T, AFL-CIO, COORDINATED BARGAINING QUARTERLY No. 3, at 3 (1984).

2. 268 N.L.R.B. No. 173, 115 L.R.R.M. 1113 (February 22, 1984).

3. 268 N.L.R.B. No. 73, 115 L.R.R.M. 1025 (January 6, 1984).

4. 269 N.L.R.B. No. 198, 116 L.R.R.M. 1025 (April 25, 1984).

5. Milwaukee Spring Division of Illinois Spring Coil Co., 268 N.L.R.B. No. 87, 115 L.R.R.M. 1065 (January 23, 1984).

6. Z. Fasman, Has Labor Law Failed? 2 (1984) (unpublished manuscript on file with author); *see also NLRB's New Majority Uproots Principles Set Under Carter, Angering Many Unions*, Wall St. J., Jan. 25, 1984, at 35, col. 3.

These recent sharp critiques of current Board policies are neither unusual nor surprising. Political turmoil and revision are nothing new to the NLRB, for the Board historically has responded to, and reflected the philosophies of, the administrations that have appointed its members.[7] Although it is probably unfortunate that the case law from the NLRB has lacked any long-term coherence and stability, it is nevertheless hazardous to evaluate particular decisions on the basis of who is sitting on the Board. In other words, even though political ideology may influence certain Board decisions, it is short-sighted to view this consideration as the critical or sole determinant in any assessment of the work of the Board. Over the years, many decisions of the NLRB have reflected sound judgments without regard to the political preferences of individual Board members.

In making these introductory observations, it is my clear purpose to divorce myself from the recent controversies over Board appointments, changes in the prevailing case law under the National Labor Relations Act (NLRA),[8] proposed legislative reform of the NLRA, the role of the General Counsel vis-a-vis the Board, and the persistent failures in organizing efforts by various union groups.[9] Rather, without expressing any views on the "politics" of the agency or on the wisdom of Board decisions in other areas, I will focus on the issues of deferral to arbitration and waiver of the duty to bargain under the NLRA, subjects of everlasting confusion at the NLRB. In my view, the current Board policy of deferring to arbitration, in lieu of hearing cases pursuant to its statutory authority to resolve unfair labor practices, is a highly salutory development. Indeed, I think that a strong argument can be made that the Board has not gone far enough in its decisions in favor of deferral.

II. THE BOARD'S DEFERRAL POLICY

Although the NLRB has no authority to *enforce* private contracts, there is no doubt that the Board may construe the terms of an agreement either to determine their legality[10] or to determine whether a party has violated its statutory duty to bargain.[11] Thus, even though breach of contract is not an unfair labor practice under the NLRA, the Board does not exceed its jurisdiction when it construes a labor agreement in order to decide an unfair labor practice charge. Nonetheless, it was long ago recognized by the Board that it was contrary to the purposes of the NLRA "for the Board to assume the role of policing collective contracts between employers and labor organi-

7. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971); Edwards, *The Judiciary, The Law and Industrial Relations: An American Perspective*, 83 CERL FORUM No. 2 (1983) (available from Center for Employment Relations & Law, Florida State University College of Law).

8. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (1982)).

9. *See generally* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

10. *See, e.g.*, Truck Drivers Union Local 413 v. NLRB, 334 F.2d 539 (D.C. Cir.) (upholding Board determination that a contract clause providing that employees shall not be subject to discharge for refusing to cross a picket line at their own work place is unlawful under section 8(e) to the extent that it protects refusals to cross picket lines in support of secondary activity), *cert. denied*, 379 U.S. 916 (1964); Local 99, International Bhd. of Elec. Workers (*Crawford Electrical Construction Co.*), 214 N.L.R.B. 723 (1974) (Board construed hiring-hall provision in light of parties' practice to find illegal encouragement of union membership under sections 8(a)(3) and 8(b)(2)); American Seating Co., 98 N.L.R.B. 800 (1952) (Board construed contract to find union-security agreement lawful under section 8(a)(3)).

11. NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967).

zations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act."[12] While the Board never has been consistent in its approach to deferral, there has been a historical acceptance of arbitration as a legitimate means of resolving labor disputes. Simply stated, the Board's willingness to defer to arbitration reflects "the underlying conviction that the parties to a collective-bargaining agreement are in the best position to resolve, with the help of a neutral third party if necessary, disputes concerning the correct interpretation of their contract."[13]

In 1955, in a seminal decision in *Spielberg Mfg. Co.*,[14] the Board announced that it would defer to an arbitration award already rendered where (1) the arbitration proceedings appeared to be fair and regular, (2) all parties to the arbitration had agreed to be bound and (3) the decision of the arbitrator was not clearly repugnant to the purposes and policies of the NLRA. The deferral doctrine reached a critical highpoint with the Board's 1971 decision in *Collyer Insulated Wire*,[15] a case involving prospective deferral. In *Collyer*, the Board was faced with a complaint alleging that an employer had breached its duty to bargain under section 8(a)(5)[16] by unilaterally changing certain wages and working conditions among unionized employees. Rather than decide the merits of the unfair labor practice charge, the Board dismissed the case in deference to the parties' contractual grievance-arbitration machinery.[17]

After *Collyer*, the deferral doctrine followed a rocky course. Initially, in *National Radio Co.*,[18] the Board extended the doctrine to include cases charging unlawful interference, coercion, restraint or discrimination under sections 8(a)(1)[19] and 8(a)(3).[20] Subsequently, however, in *General American Transportation Corp.*,[21] the

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12. Consolidated Aircraft Corp., 47 N.L.R.B. 694, 706 (1943), *enforced in part*, 141 F.2d 785 (9th Cir. 1944).
13. United Technologies Corp., 268 N.L.R.B. No. 83, at 4–5, 115 L.R.R.M. 1049, 1050 (January 19, 1984).
14. 112 N.L.R.B. 1080 (1955).
15. 192 N.L.R.B. 837 (1971).
16. Section 8(a)(5), 29 U.S.C. § 158(a)(5) (1982), provides in pertinent part:
(a) It shall be an unfair labor practice for an employer—
. . . .
(5) to refuse to bargain collectively with the representatives of his employees. . . .
17. In United Technologies Corp., 268 N.L.R.B. No. 83, at 6, 115 L.R.R.M. 1049, 1050 (January 19, 1984), the Board described the *Collyer* doctrine as follows:
> The *Collyer* majority articulated several factors favoring deferral: The dispute arose within the confines of a long and productive collective-bargaining relationship; there was no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitration to resolve the dispute; and the dispute was eminently well suited to resolution by arbitration. In these circumstances, deferral to the arbitral process merely gave full effect to the parties' agreement to submit disputes to arbitration. In essence, the *Collyer* majority was holding the parties to their bargain by directing them to avoid substituting the Board's processes for their own mutually agreed-upon method for dispute resolution.

18. 205 N.L.R.B. 1179 (1973).
19. Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1982), provides in pertinent part:
(a) It shall be an unfair labor practice for an employer—
. . . .
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . .
20. Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), provides in pertinent part:
(a) It shall be an unfair labor practice for an employer—
. . . .
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .
21. 228 N.L.R.B. 808 (1977).

Board reversed *National Radio* and thereafter ceased deferring to arbitration in cases arising under sections 8(a)(1) and 8(a)(3). And, in the 1980 case of *Suburban Motor Freight, Inc.*,[22] the Board modified the *Spielberg* doctrine by declining to defer to an arbitration award unless the arbitrator had fully considered the unfair labor practice charge.[23]

In light of these and other changes in the case law, the Board's policy on deferral often has appeared in disarray. Recent Board decisions, however, have sought to reimpose broad policies in favor of deferral and to give renewed life to *Spielberg, Collyer*, and *National Radio*.

Any discussion of the Board's current policy on deferral to arbitration must begin with *United Technologies Corp.*, a case decided early in 1984.[24] In *United Technologies*, a worker filed an 8(a)(1) charge with the NLRB, claiming that her supervisor had unlawfully threatened her with disciplinary action if she persisted in processing a grievance. The employer sought deferral to arbitration on the grounds that the employee's charge was covered by a grievance-arbitration clause in a collective bargaining agreement. Following issuance of a complaint, an Administrative Law Judge (ALJ) declined to defer to arbitration because, under the then-existing rule of *General American Transportation*, deferral was restricted to cases involving claims of a breach of the duty to bargain under sections 8(a)(5) and 8(b)(3). In its review, however, the Board used *United Technologies* to overrule *General American Transportation*. Reasoning that its resources were limited and that the parties were in a better position to resolve contract disputes, the Board held that where a company and union provide for resolution of unfair labor practices through arbitration, they should be required to use these contractual mechanisms before resorting to the Board's processes. In essence, the Board returned to the principles announced in *National Radio*, requiring deferral to arbitration in 8(a)(1) and 8(a)(3) cases unless the union's interests are adverse to those of the complaining employee, or the employer's conduct demonstrates a rejection of the principles of collective bargaining, or the employer refuses to arbitrate, or it appears that arbitration would be futile.

On the same day that *United Technologies* was decided, the Board issued its decision in *Olin Corp.*,[25] announcing new standards for post-arbitral deferral. In *Olin*, a union official was implicated in a "sick out" that followed a work assignment dispute. Relying on the collective bargaining agreement, the employer fired the union official and an arbitrator upheld the discharge. The union then filed an unfair labor practice charge under sections 8(a)(1) and (3), and an ALJ refused to defer to the arbitrator's decision. The ALJ noted that, although the issue had been raised during the arbitration proceeding, the arbitrator had made no serious effort to resolve the statutory questions posed by the grievance. The ALJ thus concluded that, under the precedent established by *Suburban Motor Freight*, he had no authority to defer to the

22. 247 N.L.R.B. 146 (1980).
23. *See also* Propoco, Inc., 263 N.L.R.B. 136 (1982).
24. 268 N.L.R.B. No. 83, 115 L.R.R.M. 1049 (January 19, 1984).
25. 268 N.L.R.B. No. 86, 115 L.R.R.M. 1056 (January 19, 1984).

arbitrator's judgment. The ALJ then went on to consider the merits of the unfair labor practice charge and found that no violation had occurred.

In affirming the ALJ's decision in *Olin*, the Board declined to reach the merits of the unfair labor practice charge and, instead, deferred to the arbitrator's judgment in the case. The Board expressly overruled *Suburban Motor Freight*, and held that in the future it would defer to arbitration decisions as long as (1) the contractual issue is *factually parallel* to the unfair labor practice issue; (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and (3) the award is not "palpably wrong," that is, the decision is "susceptible to an interpretation consistent with the Act." Under *Olin*, there is a strong presumption in favor of deference; the burden of overcoming this presumption clearly rests on the party seeking to avoid an arbitrator's decision. The decision in *Olin* also recognizes that under *Suburban Motor Freight* the Board had fallen prey to the temptation of reviewing the merits of unfair labor practice charges *before* deciding whether or not to defer. This approach completely frustrated the *Spielberg* policy of deference, leading to "overzealous dissection" of arbitration decisions[26] and wasteful duplication of efforts in the adjudication of contract grievance disputes.

Under *United Technologies* and *Olin*, arbitration again will be the preferred forum for the resolution of contractual disputes between labor and management. This policy judgment by the Board appears both to be legally sound and to make eminently good practical sense. Congress and the courts have long recognized arbitration as one of the cornerstones of industrial peace. Indeed, in *United Technologies*, the Board relied on the Supreme Court's landmark decisions in *Textile Workers v. Lincoln Mills*[27] and the *Steelworkers Trilogy*,[28] to the effect that arbitration is an essential element of collective bargaining:

> Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. For dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract.[29]

To the extent that recent Board decisions underscore and foster long-established principles emanating from *Lincoln Mills* and the *Steelworkers Trilogy*, it is difficult to find fault with these judgments in favor of deference or deferral to arbitration.

III. Contractual Waiver Doctrine

Clearly, then, there are a number of good reasons to support decisions favoring arbitration over the Board's own processes for the resolution of collective bargaining disputes. Nonetheless, I would argue that, even with respect to current NLRB case

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26. *See* Douglas Aircraft Co. v. NLRB, 609 F.2d 352, 355 (9th Cir. 1979).

27. 353 U.S. 448 (1957).

28. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960).

29. United Technologies Corp., 268 N.L.R.B. No. 83, at 9, 115 L.R.R.M. 1049, 1051 (January 19, 1984).

law, most Board decisions deferring to arbitration have been grounded on a faulty rationale. I would suggest that, because the parties to a bargaining relationship have provided for arbitration of their contract disputes, the Board has no role to play in most so-called "deferral" cases.

"Deferral" is simply an unfortunate misnomer that has contributed to the perpetual mischaracterization of contract grievance disputes. In the traditional *Collyer*-type case, the proper analysis is not one of deferral at all, but rather of waiver. Putting aside for the moment cases involving overriding public law questions (as under Title VII),[30] individual rights and the duty of fair representation, I believe that when the parties negotiate a collective bargaining agreement and stipulate that they will arbitrate disputes arising under it, they have waived many of their statutory rights under the NLRA. The parties' agreement, in essence, supplants the statute as the source of many employee rights in the context of collective bargaining.

Two recent decisions from the District of Columbia Circuit will serve to illustrate my thesis.[31] In the first case, *Fournelle v. NLRB*,[32] an employer suspended a union official for ten days because he had participated in a strike meeting in violation of a contract provision barring workers from encouraging, sanctioning, or taking part in strikes. Other striking employees were only suspended for five days. Fournelle filed an unfair labor practice charge, claiming that the company had violated sections 8(a)(1) and (3) by restraining the exercise of his right to engage in concerted activity, and by discriminating against him on the basis of his position as a union official. The Board found that Fournelle had violated the collective bargaining agreement, but that the employer had impermissibly discriminated against him by imposing a harsher penalty simply because he was a union official. On appeal, the court reversed that portion of the Board's decision finding a violation of the statute. Whatever statutory rights Fournelle may have enjoyed in the abstract, the court found that the collective bargaining agreement effectively waived his right to participate in or encourage strike activities.

The conclusion reached by the court in *Fournelle* was hardly novel, since the Supreme Court has long held that unions may bargain away workers' rights to strike during the contract term.[33] With respect to the discrimination charge, the court found that a clear arbitration ruling by the parties' own permanent umpire, holding that the contract permitted disparate punishment for union officials, should be given the same effect as explicit contractual language permitting selective discipline, and that therefore the contract waived the right of union officials to escape selectively harsher discipline. The court reasoned that since the union may waive the right to strike, the parties may also seek to increase the effectiveness of the no-strike clause by imposing additional duties on union officials to prevent work stoppages during the contract term. Although the contract in *Fournelle* did not expressly impose such duties, the

30. *See infra* notes 37–40 and accompanying text.

31. I should acknowledge that I wrote both opinions for unanimous panels of the court, so it is not surprising that I find these decisions to be persuasive authority for my view.

32. 670 F.2d 331 (D.C. Cir. 1982).

33. *See* NLRB v. Allis-Chalmers Mfg., 388 U.S. 175, 180 (1967); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956); NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939).

parties' arbitrator had interpreted the agreement as permitting selectively harsher punishment of union officials. Thus, the parties, through the collective bargaining process, had interpreted their agreement as creating higher duties for union officials during strikes.

A similar application of the contractual waiver doctrine was made in *American Freight System, Inc. v. NLRB*.[34] There, the employer fired a worker who refused to drive a truck that he believed was unsafe. The driver, Philip McArthur, filed an unfair labor practice charge after a grievance committee rejected his claim that the company had discharged him in violation of the collective bargaining agreement. The agreement protected an employee's right to refuse to operate equipment "unless such refusal is unjustified." Relying on the then-extant rule of *Suburban Motor Freight*, the Board declined to defer to the grievance committee's decision on the ground that the committee might not have considered the unfair labor practice claim. It then went on to find that McArthur's refusal to drive his assigned truck was protected concerted activity and that the employer had therefore violated section 8(a)(1) by discharging him. The court again reversed.

The Board in *American Freight System* refused to defer because it believed the case involved two distinct issues: a contractual claim and a separate statutory claim. In the Board's view, the contract allowed only a "justified" refusal to drive, whereas under the statute, a refusal based on a "good faith" belief that the truck was unsafe, amounted to protected concerted activity. Because the grievance committee may not have considered this "good faith" issue, the Board concluded that deference was inappropriate. The court rejected this reasoning, stating that:

> [t]he obvious fallacy in the Board's analysis is its contention that there is a statutory issue apart from the contractual issue. This analytical flaw is born of the Board's total failure to consider contractual waiver doctrine. . . . In this case, whatever statutory right McArthur may have had to refuse to drive his truck based on his "good faith" belief that it was unsafe was clearly and unmistakably waived by article 16 of the collective bargaining agreement, which dictates that his refusal must be "justified." . . . This case, therefore, involves solely a contractual claim, not an unfair labor practice claim. . . . In other words, assuming, *arguendo*, that an individual employee has a right under the NLRA to refuse to work in order to pursue a contract claim that is not in fact "justified" but only supported by a "good faith" belief of wrongdoing, that alleged right was waived by the collective bargaining agreement in this case.[35]

These cases make clear then that the issue is not one of Board deferral. Instead, the parties have, by waiving their statutory rights, written the Board out of their disputes. Under *Suburban Motor Freight*, the Board's attempts to discern when arbitrators had properly considered statutory issues led to inconsistent results and infrequent deferrals. The decision in *Olin* goes far towards correcting this problem, but it still permits the Board to step in if it believes the contractual issue is not sufficiently parallel to the unfair labor practice issue, or if it concludes that the arbitrator was not presented with the facts relevant to that issue. While admittedly

34. 722 F.2d 828 (D.C. Cir. 1983).
35. *Id.* at 832.

these are much narrower portals through which the Board can invade the arbitrator's province, the contractual waiver theory would eliminate them altogether: where a dispute pertains to a waivable subject that is covered by the arbitration clause, the parties have waived their rights under the NLRA and have replaced them with the rights created by the contract. The parties have provided that disputes arising under the contract should be resolved by an arbitrator. The Board, therefore, is precluded from reaching the dispute and the arbitrator's decision is final.

This system comports fully with the strong national labor policy of promoting industrial peace through arbitration, and is grounded on the equally strong policy of freedom of contract. It has the additional advantages of eliminating uncertainty and wasteful duplication of adjudication efforts. Moreover, arbitration resolves disputes much more quickly than does litigation before the Board, and arbitrators are far more familiar with contract interpretation and the "common law of the shop" than are members of the Board. Indeed, given the Board's historic tendency to follow the prevailing political winds, the contractual waiver doctrine insulates the collective bargaining parties' private ordering of their rights and responsibilities from meddlesome interference by this sometimes highly politicized body.

In advancing these views, I should emphasize that I am not addressing here those cases in which the union and employee interests are potentially adverse. The entire premise underlying the waiver theory is that of fair representation. As the Supreme Court made clear in *NLRB v. Magnavox*,[36] a union's waiver of employees' statutory rights in the economic sphere presupposes that the union fairly represents the interests of the workers. Thus, as the Court held in *Magnavox*, a union may not waive the employees' rights to choose a new bargaining representative, because on that particular issue the interests of the union and the workers diverge. It is therefore clear that when such situations arise, waiver is inappropriate. But these cases are rare, and can be handled by the Board when they do come up.

I should also make it clear that the contractual waiver theory that I espouse is in no manner inconsistent with decisions such as *Alexander v. Gardner-Denver*,[37] in which the Supreme Court held that arbitration was not a bar to formal litigation of employment discrimination claims under Title VII of the Equal Employment Opportunity Act.[38] There is a legitimate reluctance on the part of the courts to defer to arbitration in an employment discrimination case because the real underlying dispute involves a question of public policy and not private contract rights.[39] But, as noted in

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36. 415 U.S. 322 (1974).

37. 415 U.S. 36 (1974). I have often expressed grave reservations about arbitrators deciding public law issues. *See, e.g.*, Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in PROCEEDINGS OF THE 28TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 59 (B. Dennis & G. Somers eds. 1976); Edwards, *Labor Arbitration at the Crossroads: "The Common Law of the Shop" Versus External Law*, 32 ARB. J. 65 (1977); Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 LAB. L.J. 265 (1976).

38. 78 Stat. 253, 42 U.S.C. §§ 2000e to -17 (1982).

39. The Supreme Court, in Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 706 n.11 (1983), clearly distinguished between rights arising under Title VII and those arising pursuant to the NLRA:

> The union contends that Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974), demonstrates that the individual right not to be discriminated against may never be waived. In *Gardner-Denver*, however, we noted that waiver would be inconsistent with the purposes of the statute at issue there. As discussed above, the

American Freight System, in most *Collyer*- or *Spielberg*-type cases, there are no real statutory issues apart from the contractual issues. Thus, because there are no overriding public law questions, it is perfectly appropriate to compel the parties to use their own grievance-arbitration machinery to resolve their contractual disputes.

In short, waiver of individual rights under the NLRA is totally consistent with the principles of *collective* bargaining, including majority rule and exclusive representation, that underlie the Act.[40] And, more importantly, the success of collective bargaining is inexorably tied to our ability to preserve the integrity of the parties' negotiated grievance-arbitration procedures.[41]

Putting aside the cases of individual rights and the union's duty of fair representation, I believe that the collective bargaining agreement and arbitration clause supplant many statutory rights under the NLRA, and the Board therefore simply has no business intruding into what are essentially contractual disputes. In other words, in the context of bargaining disputes arising under a collective agreement, the Board's function is quite simple and extremely narrow: its sole task is to determine whether, with respect to *nonwaivable* issues, the parties' labor contract is illegal. For example, does the contract authorize hot cargo shipments in contravention of section 8(e)? Does it mandate a "closed shop" in violation of section 8(a)(3)? If so, then obviously the Board cannot defer to arbitration, since no public policy is served by allowing arbitrators to enforce illegal contracts. The parties have no authority to vitiate nonwaivable statutory rights or prohibitions by agreement or by resort to arbitration. However, with respect to the classical "economic" issues of collective bargaining,[42] the Board should leave the parties to their own contractual dispute resolution machinery.

This same standard should be applied to post-arbitral decisions as well. The arbitrator's interpretation of the contract is, in essence, *part* of the contract. If the agreement, as the parties read it, is illegal—for example, if it is interpreted to require a "closed shop"—then the arbitrator's award cannot be given effect. If the contract, as interpreted, is not illegal, the Board's inquiry should be at an end, and the award should stand. This suggested standard of post-arbitral review is far narrower than the "repugnance" test currently employed by the Board. It results in true deference, in the sense that the Board in no way second-guesses the arbitrator's decision. The parties have bargained for the arbitrator's interpretation, and that interpretation is fully accepted. The Board conducts no independent review of the parties' bargaining

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National Labor Relations Act contemplates that individual rights may be waived by the union so long as the union does not breach its duty of good-faith representation.

40. *See, e.g.*, J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

41. Long ago, Professors Archibald Cox and John T. Dunlop, two of the leading scholars on the NLRA, wrote that: "Once it is understood that the function of Section 8(a)(5) was to establish an institution, it becomes fairly clear that an employer does not commit an unfair labor practice by refusing to discuss, outside the framework of a grievance procedure, matters to which the procedure applied." Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1104 (1950). *See also* Feller, *The Impact of External Law Upon Labor Arbitration*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 83, 84 (1976): "[T]he greatest danger that the system of arbitration faces in the future is the accelerating trend to remove more and more elements of the employer-employee relationship from the exclusive control of the collective bargaining agreement."

42. *See* Fournelle v. NLRB, 670 F.2d 331, 340 (D.C. Cir. 1982).

history, nor does it engage in any contract interpretation of its own. It simply takes the contract as construed and determines whether it violates the NLRA in any way.

IV. The Continuing Duty to Bargain

The contract waiver theory can be traced back to the Board's decision in *Jacobs Manufacturing Co.*[43] and the continuing duty-to-bargain cases that followed it. Ironically, it is this area of labor law that would perhaps most benefit from the full application of the waiver doctrine. In *Jacobs*, the Board began its long and largely unsuccessful efforts to articulate a coherent theory of the duty to bargain during the contract term, and the doctrine of "clear and unmistakable waiver." A divided majority of the Board concluded in *Jacobs* that pensions were negotiable during the term of the agreement because they were not mentioned in the contract and had never been discussed during pre-contract negotiations, but that the employer was under no duty to discuss insurance benefits since the parties had "consciously explored" that issue during their pre-contract talks. *Jacobs* sowed the seed for hopeless confusion over the legal obligations of bargaining parties to discuss certain mandatory subjects during the term of their collective agreement. Its fruits can be seen in the mid-term modification/unilateral action cases that followed, where the Board began examining the language of the contract, the parties' bargaining history, their past practices, the availability of arbitration, conduct during negotiations, and notions of acquiescence in order to determine whether a refusal to discuss an issue or a mid-term modification constituted an unfair labor practice.[44]

It should be apparent that the Board is singularly ill-suited to undertake this type of analysis. Its members often are not schooled in contract interpretation. They evidence no general understanding of "the common law of the shop," and, in any given case, they will be completely unfamiliar with the bargaining history and prior conduct of the parties. In these cases the Board is engaged in a classic question of contract interpretation—*i.e.*, what did the parties intend?—and it is upon this determination that a finding of a statutory violation turns. The inefficiency and unfairness of this approach is obvious.

Perhaps the best current illustration of the Board's failure to satisfactorily resolve these continuing duty to bargain issues can be found in the *Milwaukee Spring* cases.[45] There an employer, in response to a loss of business, asked the union to forego a wage increase and proposed relocating assembly operations to a lower cost, nonunion facility. The parties bargained to impasse and the employer subsequently moved the assembly work in order to escape the comparatively higher labor costs under the existing collective bargaining agreement. The union filed an unfair labor practice charge, arguing that the relocation was an illegal unilateral action under

43. 94 N.L.R.B. 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952).

44. *See, e.g.*, Radioear Corp., 199 N.L.R.B. 1161 (1974); New Orleans Board of Trade, Ltd., 152 N.L.R.B. 1258 (1965); Speidel Corp., 120 N.L.R.B. 733 (1958). *See generally* Loomis & Herman, *Management's Reserved Rights and the National Labor Relations Board—An Employer's View*, 1 Creighton L. Rev. 34 (1968).

45. Milwaukee Spring Division of Illinois Coil Spring Co. (*Milwaukee Spring I*), 265 N.L.R.B. 206 (1982); Milwaukee Spring Division of Illinois Coil Spring Co. (*Milwaukee Spring II*), 268 N.L.R.B. No. 87, 115 L.R.R.M. 1065 (January 23, 1984).

section 8(a)(5). The Board, in its 1982 *Milwaukee Spring I*[46] decision, agreed. Noting that mid-term transfers of work are inherently destructive of collective bargaining, the Board found that the union had in no way consented to the transfer, nor had it clearly and unmistakably waived its right to discuss the subject. The Board concluded that the contract's management rights clause was too general to permit such a drastic step, and that the employer's past practice of work transfers were irrelevant to a relocation such as this. Following a change in Board membership, the Board sought a remand of the case from the Seventh Circuit, where it had been appealed, and then reversed its earlier decision. In *Milwaukee Spring II*,[47] the new Board held that the contract contained no express provision that had been modified by the relocation, and, therefore, section 8(d),[48] which prohibits unilateral modifications of terms "contained in" the collective bargaining agreement, was inapplicable. The Board also concluded that the union recognition clause, standing alone, did not freeze bargaining unit work. The parties were free to negotiate a work preservation clause, but they did not do so. The Board refused to imply one.

It is abundantly clear that in a case such as this, the Board is engaged in nothing other than straight contract interpretation—an area in which it enjoys no particular administrative expertise. It is equally obvious that despite the passage of thirty-three years since the decision in *Jacobs*, the Board is still wrestling with the question of what constitutes a breach of the duty to bargain during the term of an agreement. There is no reason to expect that in the next thirty-three years the Board will be able to provide any greater clarity or guidance in this area than it has to date. And I see no reason why it should attempt to. In my view, the Board ought to get out of this line of work whenever it can and leave it to those better equipped to handle such issues—namely, arbitrators.[49]

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46. 265 N.L.R.B. 206 (1982).

47. 268 N.L.R.B. No. 87, 115 L.R.R.M. 1065 (January 23, 1984).

48. Section 8(d), 29 U.S.C. § 158(d) (1982), provides in pertinent part:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and representative of employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . .

49. *See* Cox & Dunlop, *supra* note 41. Professors Cox and Dunlop presciently argued that where the parties provide for arbitration of all disputes arising under the contract, the Board should stay its hand in 8(a)(5) cases and allow the parties' own dispute resolution machinery to work—a view that is entirely consistent with contractual waiver theory.

In *Jacobs*, the Board offered the bargaining parties an escape route by which they could avoid at least a portion of the morass of bargaining history/clear and unmistakable waiver issues. In footnote thirteen, the Board gave its blessings to the so-called "zipper clause," in which the parties foreclosed further bargaining by expressly waiving their right to discuss any and all subjects during the term of the contract. If a "zipper clause" may be viewed as a clear waiver of the duty to discuss mandatory subjects during the term of an agreement, there is no reason why an arbitration clause should not be viewed as a waiver of the right to charge an unfair labor practice with respect to unilateral changes made during a contract term.

In most cases in which a union contends that an employer has acted improperly in taking unilateral action with respect to a mandatory subject of bargaining, the underlying claim is that the employer's action is either unauthorized or prohibited by the parties' contract. This is a straightforward contractual issue that should be presented to an arbitrator if the parties have agreed to resolve their contract dispute pursuant to binding arbitration. There is no statutory issue apart from the contract issue because the duty to bargain (or the legality of the unilateral action) rests entirely upon the arbitrator's construction of the parties' rights under the agreement. If the arbitrator rules for the company, then the union may be seen to have waived whatever rights it might have had flowing from sections 8(a)(5) and 8(d) of the NLRA. If the arbitrator rules for the union, then the remedy should be whatever the arbitrator decides the parties have agreed to under their contract.

I recognize that some commentators have strongly opposed deferral,[50] especially in cases involving charges under sections 8(a)(1) and (3).[51] As I have already suggested, there are some troublesome issues with respect to claims of individual rights under the Act; however, in most cases involving interpretations of contractual issues with respect to waivable subjects, I would maintain that history has shown that arbitration is vastly superior to the Board's politicized, time-consuming and multi-tiered adjudication processes.[52]

As the *Milwaukee Spring* cases demonstrate, contract interpretation emphatically is *not* an inquiry that the Board is particularly competent to undertake. Admittedly, the Board has the authority to decide such cases, and the courts must respect this in reviewing Board decisions in this area. However, the Board's resources are already overtaxed by its efforts to handle those matters in which it does possess special expertise. There is simply no reason why it should add to its burden by reaching out for issues that it is ill-equipped to handle. In *Milwaukee Spring*, of course, there was no apparent access to arbitration, and the Board seemingly had no choice but to interpret the contract. But the presence of an arbitration clause has not stopped the Board in the past from muddling through contract interpretation under the guise of

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50. *See, e.g.*, Alleyne, *Arbitrators and the NLRB: The Nature of the Deferral Beast*, 4 INDUS. REL. L.J. 587 (1981).

51. *See, e.g.*, Harper, *Union Waiver of Employee Rights Under the NLRA* (pts. 1 & 2), 4 INDUS. REL. L.J. 335, 380 (1981).

52. *See generally* Edwards, *Reflections of a Judge: The Advantages of Arbitration Over Litigation*, in PROCEEDINGS OF THE 35TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 16 (J. Stern & B. Dennis eds. 1983); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, in PROCEEDINGS OF THE 30TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 29 (B. Dennis & G. Somers eds. 1978).

applying the hopelessly malleable "clear and unmistakable waiver" doctrine.[53] The time has come for the Board to give full and consistent effect to bargaining parties' agreements to arbitrate contract disputes. An arbitration clause should be no less effective as a waiver of the duty to bargain than the "zipper clause" in *Jacobs*.

V. Judicial Deference to Arbitration

In addition to the benefits already suggested, the contractual waiver doctrine has the added advantage of eliminating what is currently one of the more anomalous features of labor law: given the different standards of review sometimes employed by the courts and the Board (such as when the Board followed the rule of *Suburban Motor Freight*), a court may uphold and enforce an arbitrator's award that the Board may decline to accept. Such a result simply underscores the doctrinal bankruptcy of the Board's wavering approaches to deferral.

Under section 301 of the Labor Management Relations Act,[54] courts called upon to review and enforce arbitration awards have a very circumscribed role to play. In *United Steelworkers v. Enterprise Wheel & Car Corp.*,[55] the Supreme Court stated that courts are not to judge the merits of an arbitrator's award. Rather, they must only look to see whether the award "draws its essence from the collective bargaining agreement."[56] And in *United Steelworkers v. Warrior & Gulf Navigation Co.*[57] the Court made clear that the parties' agreement includes not only its written terms, but the practices of the industry and shop as well. In short, a reviewing court's role is strictly limited to determining whether the arbitrator exceeded his or her authority under the agreement. The court is not to concern itself with whether the arbitrator resolved the issue correctly. Under this very narrow standard of review it is obvious that if an arbitrator, after looking at past practices, bargaining history, and industry custom, construed a collective bargaining agreement as permitting a plant relocation, or, for that matter, as barring such a relocation, a federal court would be obliged to enforce that construction. The arbitrator's decision, in such a case, would clearly draw its essence from the contract. And yet the *Milwaukee Spring* cases demonstrate that either of those constructions could be illegal under the Board's standard of

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53. *See, e.g.*, United Drop Forge Div., Eaton, Yale & Towne, Inc., 171 N.L.R.B. 600 (1968), *modified*, 412 F.2d 108 (7th Cir. 1969); NLRB v. Huttig Sash & Door Co., 377 F.2d 964 (8th Cir. 1967); C & S Indus., Inc., 158 N.L.R.B. 454 (1966).

54. Section 301, 29 U.S.C. § 185 (1982), provides in pertinent part:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

55. 363 U.S. 593 (1960); *see also* St. Antoine, *supra* note 52.

56. *Id.* at 597.

57. 363 U.S. 574 (1960).

review. The court, therefore, arguably would be enforcing an *illegal* contract. This, I submit, makes no sense whatsoever.

As already noted, the answer to this dilemma seems clear. Where the parties bargain for the arbitrator's interpretation of their contract, there is simply no need for the Board to second-guess that interpretation under the guise of determining whether there has been a breach of the continuing duty to bargain. Where they provide for arbitration, the parties have waived their right to the Board's interpretation of their contract. For the Board to have the final say on whether a contract permits or prohibits a given unilateral action undermines the strong national policy favoring arbitration just as surely as allowing courts to review the merits of an arbitrator's award. The same factors that counsel against judicial review of the merits militate against review by the Board in these cases.

VI. Recent Pronouncements by the Supreme Court

The Supreme Court had occasion recently to consider the contractual waiver doctrine in *Metropolitan Edison Co. v. NLRB*.[58] While the Court perhaps did not go as far in applying the waiver theory as I suggest we should, the decision appears to leave the door open for greater application of the doctrine in the future.

Metropolitan Edison, like the *Fournelle* case, involved an employer's imposition of harsher penalties on union officials than on other employees after an unlawful work stoppage. The collective bargaining agreement between the company and the International Brotherhood of Electrical Workers (IBEW) contained a no-strike/no-lockout clause similar to that in *Fournelle*. Despite the clause, union members engaged in four strikes or work stoppages between 1970 and 1974. In each case, the employer disciplined union officials more severely than non-officials. Twice the union filed grievances protesting this disparate treatment and in both cases the arbitrator upheld the company's actions. The arbitrator read the contract as imposing an affirmative duty on officials to uphold the agreement and take steps to prevent work stoppages. Breach of this duty, he concluded, warranted the harsher sanctions.

In 1977, another union set up an informational picket line which IBEW members refused to cross. Company officials ordered IBEW officials to end the stoppage by crossing the line, but they refused to do so, believing that such a move would not induce others to cross. Instead, they negotiated with the other union and, after four hours, IBEW workers returned to their jobs. The company disciplined all those who took part in the stoppage, and again imposed harsher penalties on the union officials. This time the union chose not to file a grievance but instead filed an unfair labor practice charge, alleging that the disparate treatment violated sections 8(a)(1) and (3). The Board agreed and the Third Circuit enforced its order. The court concluded that in the absence of clear contractual language imposing an affirmative duty on officials to end work stoppages, selective discipline was illegal. Significantly, the court refused to view the prior arbitration decisions as binding interpretations of the contract because *the parties' agreement provided that arbitration decisions would be binding*

58. 460 U.S. 693 (1983).

only for the term of the contract. Since the previous decisions would not bind an arbitrator subsequently called on to construe the contract, the court declined to be bound by them either.

Before the Supreme Court, Metropolitan Edison argued that even if section 8(a)(3) prohibits the imposition of harsher penalties on union officials than on other employees, the union waived this statutory protection by acquiescing in the prior arbitration decisions that upheld such penalties. In response, the union contended that the statutory right to be free of discrimination may never be waived. Two waiver issues, therefore, were clearly presented to the Court: (1) may a union waive an employee's statutory right to be protected against discrimination, and, (2) if so, did the union waive that right in this case?

The Court had little difficulty concluding that a union could indeed waive an individual worker's section 8(a)(3) right to be free of selectively harsher discipline imposed solely because of the individual's status as a union official. The Court reasoned, as did the District of Columbia Circuit in *Fournelle*, that because a union could waive employees' economic right to strike, it could also require union officials to take affirmative steps to enforce the no-strike clause. Such a provision promoted labor peace and fell well within the range of reasonableness accorded bargaining representatives. The Court repeated its warning that a union may not bargain away "rights that impair the employees' choice of their bargaining representative,"[59] but found that imposition of an affirmative duty to end unlawful work stoppages in no way constrained the employees' ability to choose which union will represent them.

The Court, therefore, endorsed the basic premise of the waiver theory that I am advocating here. In essence, it held that the parties to a collective bargaining relationship enter negotiations against a backdrop of certain statutory rights that they are free to modify or alter as they see fit, subject always to the duty of fair representation, the requirement that the union in no way impair the employees' right to choose their own bargaining agent, and the obligation of the parties to adhere to certain mandatory provisions of the Act.[60] This, I submit, is a complete answer to those who argue that the Board is abdicating its responsibilities when it defers consideration of a dispute to arbitration: the Board is not shirking its duties; rather, the parties have relieved it of its responsibilities by deciding among themselves what their rights are and providing that any disputes over those rights should be submitted to arbitration.

Turning to the second question, the Court in *Metropolitan Edison* looked to see whether the union had clearly and unmistakably waived the union officials' section 8(a)(3) rights. Despite the two prior arbitration awards, the Court concluded that there had been no such waiver. The contract itself, the Court noted, contained no explicit waiver, nor did it explicitly impose any affirmative duty on the officials from which a waiver could be inferred. The company argued that the union's failure to change the relevant contractual language in the face of the prior arbitration awards constituted an implicit waiver, but the Court rejected this contention on the grounds

59. *Id.* at 705–06.
60. *Id.* at 706 n.11.

that two arbitration awards do not "establish a pattern of decisions clear enough to convert the union's silence into binding waiver."[61]

At first blush, this language appears to be at odds with the decision in *Fournelle*, where the court held that a prior arbitration award should be given effect as a clear contractual waiver. But the Supreme Court's holding in *Metropolitan Edison* can be distinguished in two key respects. First, the Court was careful to note that under the parties' collective bargaining agreement, arbitration decisions would be binding only for the term of the agreement. Thus, at the time of the work stoppages in dispute, the prior arbitration decisions were of no force and effect, and the Court concluded that there had been no showing that the parties intended to incorporate these decisions into the subsequent agreement. In *Fournelle*, by contrast, the collective bargaining agreement provided that the arbitrator's award would be final and binding. Second, in footnote thirteen,[62] the Court in *Metropolitan Edison* stated that in order for an arbitrator's decision effectively to create a contractual waiver, it must state that the contract clearly and unmistakably imposes an explicit duty on union officials to end unlawful work stoppages. The two decisions relied upon by Metropolitan Edison contained no such statement. In *Fournelle*, on the other hand, the arbitrator had explicitly held that the contract imposed such duties.

It would appear, then, that the Supreme Court's decision in *Metropolitan Edison* is consistent with contractual waiver doctrine. The case can be read as endorsing the view that where the parties provide for final and binding arbitration of their disputes, the arbitrator's decision becomes a part of the written contract, and that contract, as construed by the arbitrator, can waive rights otherwise provided by the statute. It is not surprising that, given the facts of the case, the Court in *Metropolitan Edison* seemed to require a prior arbitral award, as opposed to the mere presence of an arbitration clause, before it would find a waiver. This probably reflects the Court's concern that the arbitration awards involved in that case were not binding or final beyond the term of the agreement. The Court obviously was reluctant to premise a waiver on decisions that not only had no binding authority, but that failed to indicate whether they were based on the parties' actual intent or the arbitrator's view of the equities. However, where the parties provide for final and binding arbitration, the problems inherent in the type of ad hoc decisions involved in *Metropolitan Edison* are eliminated—the parties manifest their unmistakable intent to live with the arbitrator's interpretation of their contract and thus an actual arbitral award need not be rendered before a waiver can be found.

The Board recently had an opportunity to consider precisely these distinctions and to apply the contractual waiver approach of *Fournelle*, but it did not do so. In *John Morrell & Co.*,[63] the Board refused to defer to an arbitrator's decision upholding selectively harsher discipline for a union official because, in rendering the decision, the arbitrator relied on the published decisions of other arbitrators rather than the parties' collective bargaining agreement. The agreement included a no-strike

61. *Id.* at 709.
62. *Id.*
63. 270 N.L.R.B. No. (April 26, 1984).

clause similar to that in *Metropolitan Edison* and *Fournelle*, and provided for final and binding arbitration of all disputes. Applying the *Olin* standard of deferral, the Board concluded that it could not defer because the award was repugnant to the Act. As the Board read *Metropolitan Edison*, an arbitral award upholding disparate punishment for union officials must be based on explicit language in the contract imposing additional duties on those officials.

While I do not in any way mean to suggest that the Board's ultimate decision in *Morrell* is wrong, I think the rationale that was employed is misguided. The case is distinguishable from *Metropolitan Edison* on the ground that the parties in *Morrell* provided for binding arbitration. I would argue that by so doing, the parties waived the union official's statutory right and substituted for it the arbitrator's interpretation of the contract. The relevant inquiry then turns on whether the arbitrator's reliance on other arbitral decisions went beyond the "agreement" as defined by the *Steelworkers Trilogy*. In other words, the Board, like a court, should look to see whether or not the arbitral decision drew its essence from the agreement. It may well be that in this case the arbitrator did in fact go beyond the agreement, in which case his decision would be invalid under either the *Olin* or contractual waiver standards of review. But had the arbitrator looked to industry custom and the prior practice of the parties merely to determine the parties' intentions, his decision *would* have been based on the agreement and would stand under contractual waiver theory.

Additionally, I think the Board's reliance on footnote thirteen in *Metropolitan Edison* is misplaced. As indicated above, the language in footnote thirteen of the Supreme Court's opinion is ambiguous insofar as it says that an arbitrator's decision, in order to create a contractual waiver, must state that the contract clearly and unmistakably imposes an explicit duty on union officials to end unlawful strikes. The Board in *Morrell* reads this to mean that there must be explicit language in the contract itself (as opposed to an arbitrator's explicit construction of the contract) to support a waiver. This view seems untenable. This is especially true in light of the Court's recent decision in *W.R. Grace & Co. v. Local 759, Rubber Workers*.[64]

In *W.R. Grace*, in compliance with a conciliation agreement with the Equal Employment Opportunity Commission and a court order, an employer attempted to maintain the existing proportion of women in the bargaining unit when laying off workers. An arbitrator ruled that these efforts, while made in good faith, nevertheless violated the agreement's seniority provisions, and that the employer was therefore liable for backpay. In upholding this award, the Court once again affirmed the deferential standard of review announced in the *Steelworkers Trilogy*. As long as the arbitral award draws its essence from the agreement, the Court stated, the courts must enforce it. "This remains so even when the basis for the arbitrator's decision may be ambiguous."[65] This language is extremely difficult to reconcile with the suggestion in *Metropolitan Edison* that an arbitrator's decision must be based on explicit contractual language. Such a suggestion seems an unwarranted departure from the Court's broad definition of "agreement" in the *Steelworkers Trilogy*. Unfortunately,

64. 461 U.S. 757 (1983).
65. *Id.* at 764.

the facts of the *Metropolitan Edison* case had the inevitable effect of producing a somewhat confusing opinion insofar as the application of contractual waiver doctrine is concerned.

VII. Conclusion

As I have tried to make clear, I believe the contractual waiver approach to resolving labor disputes is consistent with both the strong national policy favoring arbitration and the fundamental freedom to contract. When parties negotiate their respective rights and obligations and provide for binding arbitration of any disputes between them, they effectively waive many of their statutory rights. The courts and the Board should respect this bargain, require the parties to use agreed-upon grievance procedures, and refrain from second-guessing arbitration awards under the guise of determining whether there has been a breach of the continuing duty to bargain. In addition to its logical consistency, contractual waiver has a number of other virtues. By promoting arbitration, it promises greater speed and less expense in resolving disputes than Board litigation. It brings greater expertise and familiarity to bear on some of the thornier problems of labor relations. It provides much-needed clarity to the hopelessly confusing area of section 8(a)(5) and the continuing duty to bargain cases brought under it. It removes from the Board's purview a number of cases for which the Board lacks the resources or expertise to resolve. And, to come full circle with my opening observations, it allows resolution of these issues in a less politicized environment.

The Board's recent decisions have moved in the direction of contractual waiver, but they proceed from the different and, I believe, fundamentally flawed premise of deferral. The Supreme Court has embraced the waiver theory, but as *Metropolitan Edison* indicates, that embrace is something less than a bear hug. Only time will tell whether we will ever realize a full application of contract waiver doctrine.